

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE  
DISTRICT COURTS, RULES OF CRIMINAL PROCEDURE FOR THE  
MAGISTRATE COURTS, RULES OF CRIMINAL PROCEDURE  
FOR THE METROPOLITAN COURTS,  
RULES OF PROCEDURE FOR THE MUNICIPAL COURTS,  
AND CRIMINAL FORMS**

The Rules of Criminal Procedure for the District Courts Committee, the Rules for Courts of Limited Jurisdiction Committee, and the Metropolitan Courts Rules Committee have recommended proposed amendments to their respective Rules of Criminal Procedure and Criminal Forms for the Supreme Court's consideration..

If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments to:

Kathleen J. Gibson, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848

Your comments must be received on or before July 19, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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**5-303. Arraignment.**

A. **Arraignment.** The defendant may appear at arraignment as follows:

- (1) through a two way audio-visual communication in accordance with Paragraph [H]I of this rule; or
- (2) in open court.

If the defendant appears without counsel, the court shall advise the defendant of the defendant's right to counsel.

B. **Reading of indictment or information.** The district attorney shall deliver to the defendant a copy of the indictment or information and shall then read the complaint, indictment or information to the defendant unless the defendant waives such reading. Thereupon the court shall ask the defendant to plead.

C. **Bail review.** At arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5-401 NMRA. If conditions of release have not been set, the court shall set conditions of release.

D. **Pleas.** A defendant charged with a criminal offense may plead as follows:

- (1) guilty;
- (2) not guilty;
- (3) no contest, subject to the approval of the court; or
- (4) guilty but mentally ill, subject to the approval of the court.

E. **Refusal to plead.** If a defendant refuses to plead or stands mute, the court shall direct the entry of a plea of not guilty on the defendant's behalf.

F. **Advice to defendant.** The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if the defendant pleads guilty, no contest or guilty but mentally ill there will not be a further trial of any kind, so that by pleading guilty, no contest or guilty but mentally ill the defendant waives the right to a trial;

(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(6) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.

G. **Ensuring that the plea is voluntary.** The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire of the defendant, defense counsel and the attorney for the government as to whether the defendant's willingness to plead guilty, no contest or guilty but mentally ill results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

H. **Record of proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty, no contest or guilty but mentally ill, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

I. **Audio-visual appearance.** The arraignment or first appearance of the defendant before the court may be through the use of a two-way audio-video communication if the following conditions are met:

(1) the defendant and the defendant's counsel [~~are together in one room at the time of the first appearance before the court~~] have the ability of private, unrecorded communication;

(2) the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom

by members of the public; and

(3) no plea is entered by the court except a plea of not guilty.

J. **Waiver of arraignment.** With the consent of the court, a defendant may waive arraignment by filing a written waiver of arraignment and plea of not guilty with the court and serving a copy on the state in time to give notice to interested persons. A waiver of arraignment shall not be filed and is not effective unless signed by the district court judge. A waiver of arraignment and entry of a plea of not guilty shall be substantially in the form approved by the Supreme Court.

[As amended, effective October 1, 1974; October 1, 1976; July 1, 1980; May 19, 1982; October 1, 1983; March 1, 1987; September 1, 1990; August 1, 1992; as amended by Supreme Court Order 06-8300-010, effective April 15, 2006; by Supreme Court Order 07-8300-29, effective December 10, 2007; as amended by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — Paragraphs A, B, ~~[through]~~ D and E of this rule were included in this rule as originally adopted in 1972. Paragraphs A, B and ~~[D]~~E of this rule conformed to the then existing practice for New Mexico arraignments. By referring only to indictments and informations in Paragraph B of this rule the rule tacitly acknowledges that misdemeanors will rarely be prosecuted on a complaint in the district court. However, the same procedure would be used for arraignment on a complaint.

Paragraph ~~[C]~~D of this rule, by eliminating the plea of not guilty by reason of insanity, introduced a change in New Mexico procedure. *See, e.g., State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973). The elimination of this plea brought the New Mexico practice into line with the federal practice. *See generally*, 1 Wright, Federal Practice and Procedure, § 176 (1969). However, under Rule 5-602 NMRA, the defendant must give notice of the defense of insanity at the arraignment or within twenty (20) days thereafter. *See also*, Rule 12.2 of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 295-98 (1974).

Section 31-9-3 NMSA 1978 enacted by the 1982 legislature provides that a plea of guilty but mentally ill may be accepted by the court if the defendant has undergone examination by a clinical psychologist or psychiatrist and the court has examined the reports and after a hearing is satisfied that there is a factual basis for the plea. Paragraph G of Rule 5-304 NMRA provides for an inquiry to determine the factual basis of any guilty plea.

Paragraph ~~[C]~~D of this rule also specifically allows the plea of no contest with the approval of the court. The provision was taken from Rule 11 of the Federal Rules of Criminal Procedure. *See generally*, 1 Wright, Federal Practice and Procedure, § 177 (1969). Rule 11(b) of the Federal Rules of Criminal Procedure would add a provision that the court consider the views of the parties and the interests of the public before accepting a plea of no contest. *See* 62 F.R.D. 271, 275 (1974).

A plea of no contest is, for the purposes of punishment, the same as a plea of guilty. *North Carolina v. Alford*, 400 U.S. 25, 35-36 (1970); *cf. State v. Raburn*, 76 N.M. 681, 417 P.2d 813 (1966). *See generally*, 62 F.R.D. 271, 277-78 (1974). Consequently, Paragraphs ~~[E]~~E and ~~[F]~~G of this rule require the court to give the defendant the same advice given when a plea of guilty is entered and also insure that the plea is voluntary. However, unlike the case in which the defendant pleads guilty, a court need not inquire into whether or not there is a factual basis for the no contest plea. *See* Paragraph G of Rule 5-304 NMRA.

Elimination of the inquiry into the factual basis for the no contest plea is consistent with the use of the plea where the defendant does not want to admit any wrongdoing. A defendant may want

to avoid pleading guilty because a guilty plea can be introduced in subsequent litigation. Under Rule 11-410 NMRA, a plea of no contest is not admissible. (The Rules of Evidence contain an inconsistency, however, in that the no contest plea, declared inadmissible under Rule 11-410 NMRA, is declared to be not excluded by the hearsay rule under Paragraph V of Rule 11-803 NMRA.) The fact that the plea of no contest will not be admissible in subsequent litigation should be considered in the court's decision to approve the plea. *See generally*, 63 F.R.D. 271, 277-78, 286 (1974).

Paragraphs ~~[E, F and I]~~ F, G and J, governing plea procedures, were added in 1974. They were taken from Rules 11(c), (d) and (g) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 275-86 (1974).

Paragraph [E] of this rule prescribes the advice the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. Except for Subparagraphs (5), (6) and (7), added in 1990 and 2007, the rule codifies the constitutional requirements set forth in *Boykin v. Alabama*, 395 U.S. 238 (1969). *See also Henderson v. Morgan*, 426 U.S. 637 (1976), holding that the trial judge must explain the nature of the charge of murder, i.e., the court must explain intent to kill to the defendant if intent to kill is an element of the offense, prior to acceptance of a plea of guilty. The trial judge may want to refer to essential elements in UJI Criminal, particularly when they have not been set forth in the accusatory pleading. Although it has been a common practice in New Mexico to also advise the defendant that he is giving up a right to appeal, that advice is not included in either the rule or in the approved form for a guilty plea proceeding. A guilty plea does not prevent an appeal in New Mexico. *Cf. State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Subparagraph (5), requiring the court to "warn" the defendant that a conviction could affect the defendant's immigration or naturalization status, was added in 1990. Subparagraphs (6) and (7), added in 2007, require the court to advise the defendant of certain limitations on the right to bear arms and sex offender registration requirements that might result depending on the crimes that are the subject of the plea. In 2010, Subparagraph (2) was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. *See Marquez v. Hatch*, 2009-NMSC-040, ¶ 13 (providing that "if the district court is aware of the defendant's prior convictions that would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant's sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information").

Paragraph [F] G of this rule requires the court to determine that a plea of guilty or no contest is voluntary before accepting either plea. As noted above, Paragraph G of Rule 5-304 NMRA also requires that the court satisfy itself that there is a factual basis for a plea of guilty. Both of these requirements have been in the federal rules since 1966, and also have a basis in constitutional law. *See Santobello v. New York*, 404 U.S. 257 (1971). The court must not only inquire of the defendant, but must, "make a separate and distinct inquiry" of defense counsel and counsel for the government as to the existence of any agreement or discussions relative to the plea. *State v. Lucero*, 97 N.M.

346, 639 P.2d 1200 (Ct. App. 1981).

Finally, it should be noted that Paragraph [G]H of this rule makes it clear that plea proceedings before the court must be on the record. *See Santobello v. New York, supra.*

#### AUDIO-VISUAL ARRAIGNMENTS.

Paragraph [H]I provides that a defendant may be arraigned by way of a two-way closed circuit audio-video communication between the defendant, his legal counsel and the court and the prosecutor. The committee assumes that proper equipment will be installed prior to conducting an audio-video arraignment pursuant to Paragraph [H]I. Proper equipment includes a direct cable connection to the court's audio recording system to assure that a "record" is made of the arraignment.

#### *Right of Confrontation.*

Both the United States Constitution and the New Mexico Constitution guarantee a defendant the right to be present in the courtroom to confront his accusers. *See Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed 2d 353 (1970).

Actual presence in the courtroom, however, is not always necessary. The right can be waived in misdemeanor cases by the accused's counsel. The defendant's presence is not required during a pretrial detention hearing. *See United States v. Zuccaro*, 645 F.2d 104, 106 (2d Cir.) (*cert. denied*, 454 U.S. 823, 102 S. Ct. 110, 70 L.Ed2d 96 (1981)). The continued presence of an accused is not required if the accused voluntarily absents himself after the trial has commenced or if the accused engages in conduct which justifies his being excluded from the courtroom. See Rule 5-112 NMRA.

Although the general rule is that the accused has a right to a face to face confrontation, this rule is subject to policy or necessity considerations. *See State v. Tafoya*, [~~N.M. Ct. App. No. 9004, decided October 7, 1986~~]105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986), finding that the right to face to face confrontation must give way when necessary to protect a child who is a victim of a sex offense from further mental or emotional harm. In *Tafoya*, the New Mexico Court of Appeals held that a defendant is "present" during a deposition when the defendant is in a control booth in constant contact with his attorney and can view all of the proceedings.

#### *Use of Audio-Video System during Arraignment Proceedings.*

The use of a two-way audio-video system to arraign a defendant while in jail is apparently becoming fairly common in many areas. Although the use of an audio-video system in which the defendant would participate in the trial from a hospital by use of a single television and a telephone by which he could communicate with counsel may be insufficient, *People v. Piazza*, 92 Misc.2d 813, 401 NYS2d 371 (1977), the conducting of an arraignment on felony charges via a closed circuit two-way audio-video system has been upheld. *Commonwealth of Pennsylvania v. Terebieniec*, 408 A.2d 1120 (1979).

#### *Guilty Plea.*

It is clear that a guilty plea cannot be accepted without a record showing that the defendant intelligently and voluntarily entered the plea. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 170, 23 L. Ed. 2d 274 (1969). Paragraph [H]I limits audio-video arraignments to those proceedings in which the defendant will have his rights explained and enter a plea of not guilty.

[Commentary, as amended by Supreme Court Order \_\_\_\_\_, effective \_\_\_\_\_]

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